90-511

No.

In The
Supreme Court of the United States
October Term, 1990

MICHAEL MA,

Petitioner,

v.

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARTHUR L. KLEIN*
HAL R. MORRIS
RAANA C. RAFIULLAH
ARNSTEIN & LEHR
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100

Counsel for Petitioner.
**Counsel of Record*

ARNSTEIN & LEHR
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100
Of Counsel.

QUESTION PRESENTED

Whether an American bank may properly exercise the unilateral and unchecked power to transfer a foreign investor's assets to another country without affording the investor an opportunity to object or any other procedural protection?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: *Page*

STATUTES, RULES AND OTHER AUTHORITY:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully requests that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit, entered on June 21, 1990. In a two to one decision, the Seventh Circuit affirmed a decision of the United States District Court for the Northern District of Illinois which granted Respondent's motion for summary judgment.

OPINION BELOW

The opinion of the Seventh Circuit is officially reported at 905 F.2d 1073 (7th Cir. 1990). It is reprinted in the appendix to this petition, commencing at page 1a. Neither the memorandum opinion and order of the District Court granting summary judgment to Respondent (appendix, p. 9a) nor the District Court's Order denying Petitioner's motion for reconsideration (appendix, p. 13a) are reported.

JURISDICTION OF THIS COURT

Judgment was entered by the Court of Appeals for the Seventh Circuit on June 21, 1990. (appendix, p. 14a). This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves Section 304 of the Bankruptcy Code, 11 U.S.C. §304, which provides:

CASES ANCILLARY TO FOREIGN PROCEEDINGS

(a) A case ancillary to a foreign proceeding is commenced by the filing of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—

(1) enjoin the commencement or continuation of—

(A) any action against—

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

STATEMENT OF THE CASE

This petition arises from the District Court's Order granting Respondent's cross-motion for summary judgment and the Circuit Court's affirmance of that Order. Petitioner, Michael Ma ("Ma"), commenced this action against Respondent, Continental Illinois National Bank & Trust Company, ("the Bank"), seeking to recover $157,432.37 (plus interest) taken by the Bank from Ma's money market bank account with the Bank and sent to a purported bankruptcy Receiver in Hong Kong.

Ma, a citizen of the People's Republic of China, opened a money market account with the Bank on December 6, 1984. The deposit contract explicitly stated that it was subject to Illinois and federal law. Under the terms of this "Account Agreement," money could be withdrawn from the account only at the request or assent of the depositor.

In 1985, a judgment creditor commenced an involuntary bankruptcy proceeding against Ma in Hong Kong, and the Register General of Hong Kong was appointed as the Receiver and Trustee of Ma's bankruptcy estate. Ma never received notice of the involuntary bankruptcy proceeding. Nonetheless, on April 1, 1985, a Hong Kong Court entered an *ex parte* receiving order against Ma. Ma did not receive notice of the *ex parte* order.

The purported Hong Kong Receiver began marshalling the assets of Ma's Hong Kong estate, despite the lack of notice to Ma. On April 18, 1985, the Receiver demanded that Continental Illinois Bank Limited ("Limited"), a Cayman Island Banking corporation doing business in Hong Kong (*not* the Respondent Bank) close Ma's accounts with Limited and remit the proceeds to the Receiver. On or about April 29, 1985, Limited complied with this demand.

On June 5, 1985, the Receiver again demanded that Limited "close [Ma's] accounts and remit to this office the credit balance(s)." Apparently in response to this second demand, Limited telexed the Bank in Chicago and requested copies of Ma's bank statements there. The Bank supplied those statements without informing Ma.[1]

On June 26, 1985, the Receiver notified Limited that it was in receipt of a statement for Ma's money market account with the Bank in Chicago. At that time, the Receiver wrote to Limited and stated:

> I am faced with the difficulty of having your Chicago branch[2] at which the account is held recognize [sic] the Hong Kong receiving order which has been made against Ma, and my subsequent appointment as trustee in bankruptcy.
>
> *Would you please advise me that the policy of your Chicago branch will be. Is it likely that my Hong Kong appointment would be recognized [sic], or would I have to obtain an order from a local court in Chicago to enable me to recover the money*? Obviously it at all possible, I would wish to avoid the difficulty and expense of having to take action in the U.S. (Emphasis added).

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[1] The Bank is a national banking corporation doing business in Illinois and Limited is now a subsidiary of the Bank. The two are and were, of course, separate corporations.

[2] Although the Bank was not then and never was a "branch" of Limited, neither the Bank nor Limited ever attempted to clarify this point with the Receiver. As noted above, they are in fact separate corporations.

In response to this correspondence and despite the Receiver's plain acknowledgment that United States court orders were necessary for his appointment to be recognized in the United States by the Bank, Limited simply sent a telex to the Bank asking it to close Ma's account and requesting a "demand draft" and "debit" of the $157,432.37 involved in this action. On the basis of Limited's request alone, without receiving a demand or any other request directly from the Receiver or Ma, and without even notifying Ma, the Bank closed his account and sent the account balance of $157,432.37 to Limited on July 1, 1985.

On July 3, 1985, *after* the Bank had already closed Ma's account and transferred his funds at the request of Limited, the Bank received its very first correspondence from the Receiver. It asked:

> Whether, in the first instance, your bank [e.g., Respondent] will acknowledge that I have a claim to the money and freeze the account until any requirements to establish my entitlement have been complied with, *would you also advise me what steps the bank will require that I take so establish my entitlement, and eventually recover the money.* (Emphasis added).

The Receiver thus recognized again what the Bank chose to ignore, i.e. that procedural steps in this Country were required *before* the Receiver could even seek Ma's funds from the Bank.

In March of 1987, Ma moved to set aside the involuntary bankruptcy proceeding and *ex parte* receiving order in Hong Kong. The Hong Kong court granted Ma's motion and dismissed the bankruptcy for lack of personal jurisdiction. In dismissing the bankruptcy, the Hong Kong court observed that Ma had been denied even the most fundamental and minimal notion of due process since he was never served. In September of 1988, with the Hong Kong bankruptcy now dismissed, Ma brought this action against the Bank in the United States District Court for the Northern District of Illinois seeking the return of his $157,432.37 money market account.[3]

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[3] Jurisdiction in the District Court was based on complete diversity of citizenship between Ma, a Chinese citizen, and the Bank, an Illinois corporation with its principal place of business in Illinois. The amount in controversy, exclusive of interest and costs, exceeded the jurisdictional amount. 28 U.S.C. §1332.

On August 3, 1989, the District Court ruled on cross-motions for summary judgment. It held that, assuming the Bank had breached its contract with Ma by transferring Ma's funds at Limited's request, Ma had suffered no damages as a result of the Bank's breach.[4] Therefore, the District Court entered judgment in favor of the Bank (appendix, p. 9a) and, on August 16, 1989, denied Ma's motion for reconsideration. (appendix, p. 13a).

Ma appealed to the United States Court of Appeals for the Seventh Circuit which affirmed the District Court in a two-to-one decision. The Circuit Court assumed that the Bank breached its deposit contract with Ma and that Ma owns the right of action against the Bank, but stated that "[t]here is still a matter of causation." (appendix, p. 3a). On this issue, the Court retrospectively concluded that the Bank's failure to follow the "formal" procedures set forth in Section 304 of the Bankruptcy Code "seem[ed] to work for rather than against Ma: had the receiver filed suit in this country to obtain a §304(b)2 order, the costs of administration would have been higher than they were." (appendix, p. 3a).

The Court of Appeals' holding retroactively blessed the Bank's deliberate refusal to accord Ma even the minimal procedural protections of Section 304(b)(2) — protection that even the Hong Kong Receiver repeatedly suggested should be invoked — by rationalizing that "'the procedures the Bank followed did not cause Ma any loss." (appendix, p. 7a). To the contrary, however, as Judge Cudahy noted in his partial dissent, "[t]o allow Banks willy-nilly to ship their depositors funds on demand to foreign receivers in hope that the requests will subsequently prove legitimate seems to me very bad policy indeed." (appendix, p. 7a). However, it is that very bad policy which the Bank followed and which the courts have thus far permitted. Petitioner respectfully urges that a Writ of Certiorari be granted to review and correct those decisions.

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[4] The District Court's ruling is not supported by the record. An uncontroverted Affidavit, signed by Ma, unequivocally establishes that after taxation of costs, no funds were left in the hands of the Hong Kong Receiver to return to Ma. On appeal the Seventh Circuit recognized this fact but nevertheless affirmed the District Court.

REASONS FOR GRANTING THE PETITION

I. The Bank Should Not Have Released Ma's Funds To a Foreign Receiver Unless And Until A Petition Was Filed Under Section 304.

The Bank should not have released Ma's funds to Limited, to the foreign Receiver, or to anyone else but Ma himself, absent a United States court order directing it to do so. The Bank was clearly obligated to require the Hong Kong Receiver to initiate an "ancillary proceeding" (11 U.S.C. §304(a)) with a bankruptcy court in Illinois before it transferred Ma's funds to Limited in Hong Kong.[5]

As Judge Cudahy stated in partial dissent:

> There is absolutely no legal basis for the Bank to release funds at the request of a foreign receiver unless and until a petition has been filed under 11 U.S.C. section 304 to authorize ancillary proceedings in Illinois. At that point, a judge in Illinois may direct the surrender of the funds.

(appendix, p. 7a).

To say the very least, "the preferable procedure is to have the ancillary proceeding brought in the United States bankruptcy court so that the provisions of 11 U.S.C. §304 (b) and (c) can be applied by the bankruptcy court here to determine whether or not plaintiff's claim should be adjudicated here or in [the foreign country]." *RBS Fabrics Ltd. v. G. Beckers & Le Hanne,* 24 Bankr. 198, 200 (S.D.N.Y. 1982).

Section 304(c) is designed to give a court maximum flexibility in handling ancillary cases. Principles of international comity and respect for the judgments and laws of other nations suggest that the courts should fashion appropriate orders in light of the circumstances of each case, rather than following inflexible rules. H. REP. NO. 595, 95th Cong., 2d Sess. 324-25, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6281.

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[5] Indeed, as the Bank's own deposit agreement was subject to Illinois and Federal law — which provide for ancillary proceedings — the Bank nevertheless chose to breach its agreement and not apply Section 304.

In addition, before a foreign bankruptcy may be accorded recognition in this country, a United States court must consider general principles of comity to determine if the foreign laws comport with due process and fairly treat the claims of any local creditors. *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 714 (2d Cir. 1987). For comity to be extended, a court here must *first* be satisfied that the foreign court has abided by fundamental standards of procedural fairness akin to our concept of due process. *See Cunard S.S. Co. v. Salen Reefer Service AB*, 773 F.2d 452, 457 (2d Cir. 1985). Only after the court determines that "fundamental standards of procedural fairness" were followed in the foreign forum can a foreign creditor, or Receiver, enforce a judgment against the debtor or the property of the debtor, or "order other appropriate relief." 11 U.S.C. §304(b).

Congress enacted Section 304 for the very purpose of dealing with the complex problems involved in determining the legal effect to be accorded foreign bankruptcy proceedings. The section was specifically intended to govern situations like this one, where a foreign creditor sought to seize United States assets of a debtor. *See Cunard S.S. Co. v. Salen Reefer Services AB*, 773 F.2d 452, 454-455 (2d Cir. 1985), *citing*, S. REP. NO. 989, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, 5787, 5821; H. REP. NO. 595, 95th Cong., 2d. Sess. 324-25, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, 5963, 6281.

But the Bank single-handedly undermined and evaded Congressional intent and well-settled principles of procedural fairness by ignoring the judicial process mandated by Section 304. It is unfathomable that the Bank, or anyone holding another's assets, can be permitted to unilaterally deny foreign investors the procedural protections guaranteed by Section 304. As Judge Cudahy recognized, this is "very bad policy indeed."

The seemingly confident assertion of the Circuit Court majority "that, had the receiver made an application to the district court pursuant to section 304, the Hong Kong receiver's credentials would certainly have been accepted despite the service defect," (appendix, p. 7a, Cudahy, J., *concurring in part, dissenting in part*) is, to say the least, misplaced. Personal service is the very cornerstone of jurisdiction. *See International Shoe Co. v. Washington*, 326 U.S. 316, 317 (1945). The Hong Kong

bankruptcy court which entered the *ex parte* receiving order lacked jurisdiction for that reason, as the Hong Kong courts themselves concluded. The majority's gratuitous conjecture cannot "legitimate retroactively the unauthorized release of the funds by the Bank." (appendix, p. 7a).

In short, Ma was entitled to the fundamental right and opportunity to demonstrate that the Hong Kong bankruptcy court lacked jurisdiction and that its orders were therefore incapable of enforcement here. Upon the commencement of an ancillary proceeding, Ma was entitled to notice so that he would have had the opportunity to collaterally attack the receiving order and/or object to the Receiver's authority to act pursuant to the order here. Unlike the Bank, which acted on its own, a court is obliged to consider the guidelines set forth in Section 304(c) and principles of comity to determine whether or not to recognize a foreign bankruptcy proceeding. In order to be entitled to comity, the foreign court must obtain valid personal jurisdiction over the defendant (*Cunard,* 773 F.2d at 457) and the proceeding must comport with fundamental standards of procedural fairness. *See Interpool, Ltd. v. Certain Freights of M/V Venture Star,* 102 Bankr. 373, 377 (D.N.J. 1988). Given the facts of this case, a United States court would necessarily have concluded, as the Hong Kong court later did, that the Hong Kong bankruptcy proceeding was invalid for lack of jurisdiction and thus could *not* receive recognition here.

This Court has unequivocally recognized that "an elementary and fundamental requirement of due process in *any* proceeding which is to be accorded finality is notice. . . ." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (emphasis added). As the Hong Kong appellate court held:

> [H]ad the judge who heard the [bankruptcy] petition directed his mind to the question of proof of service, he could not have been satisfied with it. It follows then that he had no power to make the order that he did.

If an ancillary proceeding had been initiated, a court here would, at the very least, have had the power to stay enforcement of

the receiving order, or "order other appropriate relief," 11 U.S.C. §304(b), pending resolution of the jurisdictional issue in Hong Kong.

Instead of deferring to the courts, as the Hong Kong Receiver himself suggested, the Bank assumed supreme decision-making authority to rule on the legitimacy of the Hong Kong bankruptcy proceeding and the *ex parte* receiving order. In so doing, it blatantly ignored Ma's rights to notice and a hearing under Section 304 when it gave away his money.

The fate of Ma's funds, and the funds of any foreign investor, should not be left to the haphazard whim of a bank, acting alone. Indeed, the Bank had no specific procedural policy for dealing with situations such as this. No one entrusted with another's funds should be allowed to give them away at the "command" of a foreign receiver asking "help" in avoiding the "difficulty" and expense of the statutorily mandated, court administered, safeguards put in place to protect assets here. It is surely no answer to say, as the Seventh Circuit majority did, that the depositor "might have lost" his assets anyway.

II. The Bank's Unauthorized Release of Ma's Funds Without A Demand And Without Notifying Ma In Advance Offends Fundamental Notions of Due Process.

In erroneously upholding the Bank's unauthorized transfer of Ma's funds, the Seventh Circuit also ignored the conspicuous lack of any internal Bank procedures for dealing with funds of depositors who become involved in foreign bankruptcies.[6] The deposit agreement between Ma and the Bank states that accounts that are the subject of litigation "may" have "restricted access." But nowhere does the agreement refer to or permit the closing of accounts and transfer of funds without prior notice to the account owner or, at the very least, a valid United States court order. Clearly, it is reasonable and just for an account owner,

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[6] Quite illogically, the Bank notified Ma of a third-party request for information, but found it unnecessary to notify Ma before unilaterally closing his account and transferring the account balance half-way around the world.

like Ma, to expect notice before his account is taken, released or transferred by the Bank.[7]

Indeed, the Bank released Ma's funds without even receiving a demand from the foreign Receiver himself. Rather, the Bank transferred over $157,000.00 solely on the "authority" of a one-paragraph telex from another bank. As discussed *supra*, the Bank was obligated to require the Receiver to procure a United States court order before transferring Ma's funds. At a bare minimum, it was at least obligated to receive an "official" demand for Ma's funds from the Hong Kong Receiver himself and to give Ma notice of the demand.

The Bank's unauthorized transfer of Ma's funds, without notice or a demand, patently offends traditional concepts of due process. The Bank has, in effect, deprived Ma of his property without due process of law. *Accord, North Georgia Finishing, Inc., v. Di-Chem, Inc.*, 419 U.S. 601, 606, (1975). Although the Bank is not a state actor, and therefore not technically held to the same constitutional standards as a state or the federal government, the same procedural principles of fairness should apply. Section 304, indeed even a simple notice, would have provided the requisite protection so that Ma and other investors would not be subject to arbitrary or mistaken deprivations of property through unilateral conduct.

The central meaning of due process in this country is well established: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (citations omitted). The Bank should be held to no lesser duty. It should be required to follow a fair process of decision-making and notice before it is allowed to transfer or release the property of a depositor like Ma to a third-party — a process embodied in Section 304.

The fundamental requirements of notice and an opportunity to be heard are designed to protect an individual's "use and

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[7] The avenues of recourse available to Ma had he been notified (i.e., the ability to collaterally attack the receiving order or dispute the extension of comity to the foreign bankruptcy and receiving order) are discussed in detail at pages 9 and 10 *supra*.

possession of property from arbitrary encroachment — to minimize substantially unfair or mistaken deprivations of property." *Id.* at 81.[8] As this Court stated:

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . (and n)o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Joint Antifascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172 (1951) (Frankfurter, J., *concurring).*

The Bank's conduct and the Seventh Circuit's legitimating decision plainly offend settled principles of procedural fairness. The Bank unilaterally decided that Ma was not entitled to an ancillary proceeding when it "excused" the foreign Receiver for initiating one. The Bank did not even require the Receiver to make a demand on the Bank before it released Ma's funds and it failed to notify Ma before it closed his account and transferred his funds. The Bank utterly failed to protect Ma from the arbitrary or mistaken deprivation of property and denied Ma his right to the operation of two fundamental procedural protections — notice and an opportunity to be heard.

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[8] In an analogous fashion, applying these principles, this Court requires certain procedures before an individual can be deprived of property pursuant to various state prejudgment remedy statutes. The due process principles underlying these cases apply by analogy to the Bank here as well. *See generally North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (A garnishment statute failed to satisfy due process because the garnished property was put totally beyond use during the pendency of litigation merely on the basis of a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (Replevin laws violated due process because they denied the possessor the right to a prior opportunity to be heard before chattels were taken, even though the possessor could regain possession by posting a security bond and had an opportunity for a post-seizure hearing); *Sniadich v. Family Finance Corp.*, 395 U.S. 337 (1969) (Prejudgment garnishment procedure which did not provide defendant with an opportunity to be heard violated due process). *But see Mitchell v. W.T. Grand Co.*, 416 U.S. 600 (1974) (State trial judge could order sequestration of property on the application of a creditor without notice and hearing if the opportunity given for *ultimate* judicial determination was adequate).

Significantly, the Seventh Circuit recognized that "[c]ourts of the United States enforce judgments provided that the parties had the opportunity to present their claims to foreign tribunals following procedures designed to secure a sound administration of justice." (appendix, p. 4a). However, it ignored the Bank's conduct altogether and surmised, after-the-fact, that Ma did not question the sufficiency of the Hong Kong procedures and did in fact have notice of the Hong Kong proceeding. *Id.* To the contrary, Ma repeatedly questioned not only the transfer but the jurisdiction of the Hong Kong court. Indeed, Ma eventually prevailed and the Hong Kong bankruptcy was found to be lacking in personal jurisdiction and therefore void *ab initio*. Notwithstanding this fact, the Seventh Circuit's retrospective rationalization of the Bank's conduct tacitly approved an obvious wrong. However, "[t]his Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

By upholding the Bank's unauthorized release of Ma's funds, the Seventh Circuit sends an ominous message indeed to foreign investors who contemplate future business with a bank in the United States. The message rings loud and clear; an American bank has free license to transfer a foreign investor's funds at the mere unsupported request of a foreign Receiver and without even first notifying the investor. If this is really the law, foreign investors around the world should and will surely think twice before depositing their assets in this Country's banks.

CONCLUSION

For each and all of the reasons set forth above, Petitioner respectfully requests this Court issue a Writ of Certiorari and thereafter rule that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

ARTHUR L. KLEIN*
HAL R. MORRIS
RAANA C. RAFIULLAH
ARNSTEIN & LEHR
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100

Counsel for Petitioner.
**Counsel of Record*

ARNSTEIN & LEHR
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100
Of Counsel.

APPENDIX

APPENDIX

TABLE OF CONTENTS

PAGE

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-2844

MICHAEL MA,

Plaintiff-Appellant,

v.

CONTINENTAL BANK N.A.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 7827—**William T. Hart**, *Judge.*

ARGUED MAY 14, 1990—DECIDED JUNE 21, 1990

Before CUDAHY and EASTERBROOK, *Circuit Judges*, and SNEED, *Senior Circuit Judge.**

EASTERBROOK, *Circuit Judge.* Michael Ma, a citizen of the People's Republic of China, opened a money market account at Continental Bank N.A. on December 6, 1984, with a deposit of $150,000, transferred from Continental's subsidiary in Hong Kong, the same day a court of Hong Kong entered against Ma a judgment of HK $35 million, then equivalent to US $4.5 million. Ma left Hong Kong

* Hon. Joseph T. Sneed, of the Ninth Circuit, sitting by designation.

two days later for Toronto, leaving the judgment unsatisfied. Fong Sze Ming, the judgment creditor, commenced an involuntary bankruptcy proceeding against Ma in Hong Kong, and the court appointed the Registrar General of Hong Kong as the receiver and trustee of Ma's estate in bankruptcy.

In the course of marshalling the assets of the estate, P.K.C. Li, a solicitor representing the receiver, asked the Bank's subsidiary whether it held any of Ma's funds. Li learned that the funds formerly in the subsidiary's hands had been transferred to the parent, and he wrote the subsidiary asking what steps the Bank would require of him before remitting. The subsidiary then wrote Continental, "authorizing" it to transfer the money to the receiver. Continental did so on July 1, 1985, without notice to Ma. (Actually the Bank returned the money to its subsidiary, which remitted to the receiver; this detail is immaterial.)

The receiver collected more than US $400,000 from Ma's bank accounts and the sale of assets located in Hong Kong. In 1987 Ma asked the bankruptcy court to vacate the appointment on the ground that he had not been served with process. The bankruptcy court agreed with this argument. Before the question could be resolved on appeal, Ma settled with the judgment creditor. Ma abandoned to his creditor all assets in the hands of the receiver and paid an additional HK $9.1 million; the creditor withdrew his appeal of the order dismissing the bankruptcy case.

Ma then filed this suit against Continental under the alienage jurisdiction, 28 U.S.C. §1332(a)(2), contending that Continental broke its promise to hold the funds subject to his order. He asked for damages equal to the amount of the deposit plus interest. The district court granted summary judgment to the Bank, holding that Ma could not establish damages because the money went to the receiver and thence to Ma's creditor, so he received its value. The difficulty with this conclusion springs from Ma's affidavit, which informs us (without contradiction from the Bank) that the receiver's expenses of gathering

and selling the property consumed about half of its value, and that a combination of court costs and receiver's fees leaves little if any to turn over to the creditor. Given the posture of the case and the lack of an official report from the receiver detailing the disposition of the funds in his custody, we must assume that Ma received precious little credit against the judgment on account of the receiver's efforts. It is as if the receiver laid his hands on a Tang horse later smashed in transit: the creditor would allow in settlement no more than the value of the shards of pottery, and Ma would suffer injury equal to the difference between the horse whole and the rubble.

It does not follow that Ma is entitled to recover the $150,000 (or a horse) from the Bank. We may assume that the Bank broke the deposit contract. We also assume that Ma owns the right of action against the Bank. (Any claim on the contract may well be an asset of the estate in bankruptcy under Hong Kong law; we do not pursue the question because neither side noticed the difficulty.) There is still a matter of causation. Continental did not promise to resist or ignore lawful process. A receiver appointed in the United States would have been entitled to the funds without ado by virtue of 11 U.S.C. §542(b). A stakeholder who in good faith turns assets over to a trustee is not answerable for the trustee's subsequent acts, even if they greatly deplete the assets. *Restatement (Second) of Trusts* §321. Section 542 does not apply to a foreign trustee, but 11 U.S.C. §304 authorizes proceedings ancillary to foreign bankruptcy cases. Once the "foreign representative" (the generic statutory term for trustees, receivers, and the like) files a petition, the court may direct the stakeholder to surrender the assets, §304(b)(2). The receiver did not file a proceeding under §304, so the Bank does not get the immunity a judicial turnover order would have provided, but the omission seems to work for rather than against Ma: had the receiver filed suit in this country to obtain a §304(b)(2) order, the costs of administration would have been even higher than they were.

Not so fast!, Ma rejoins. If the receiver had filed an ancillary action under §304, he would have been met by the defense that the Hong Kong court should have dismissed the creditor's petition without appointing a receiver. Yet nothing in §304 suggests that an American court will indulge a collateral attack on the appointment of a receiver. Courts of the United States enforce foreign judgments provided that the parties had the opportunity to present their claims to foreign tribunals following procedures designed to secure a sound administration of justice. E.g., *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895); *Clarkson Co. v. Shaheen*, 544 F.2d 624 (2d Cir. 1976), applied to a case under §304 by *In re Gee*, 53 B.R. 891 (Bankr. S.D. N.Y. 1985). Section 304 applies to any "foreign representative"; the receiver unquestionably was such a person. Hong Kong used the legal procedures of the United Kingdom; Ma does not question the sufficiency of the procedures available there. He also does not contend that the considerations listed in §304(c) offered sufficient reason not to enter a turnover order.

Matters are a little more complex because of the principle that a collateral attack on a foreign judgment is possible when the foreign court lacks jurisdiction, *Koster v. Automark Industries, Inc.*, 640 F.2d 77 (7th Cir. 1981), and Ma stresses that in 1987 a court in Hong Kong vacated the proceeding because of failure to serve process on Ma personally. *Ex parte Fong Sze Ming*, 1987 No. 77 (H.K. Ct. App.). One obstacle to this analysis, which the Bank does not mention, is that the appointment of a receiver is not a "judgment"; it may well be that procedural steps leading to a judgment should be recognized in the United States prior to service. See *Cunard S.S. Co. v. Salen Reefer Services AB*, 773 F.2d 452, 457-58 (2d Cir. 1985); *In re Enercons Virginia, Inc.*, 812 F.2d 1469, 1473 (4th Cir. 1987). One further complication is that the receiver in Hong Kong may have had authority ("jurisdiction") because of the location of assets there; principles of *in rem* and *quasi in rem* jurisdiction do not depend on jurisdiction over the person of all claimants. See *Canada*

Southern Ry. v. Gebhard, 109 U.S. 527 (1883). None of the parties makes anything of this either, so we shall press on.

Although service of process is an ingredient of personal jurisdiction as that term often is used in the United States, not all of the technical requirements of service are sufficient grounds for a collateral attack. Service is designed to produce knowledge; although rules may and usually do require formal service in order to make very sure of knowledge, and courts may dismiss a case when proper service has not been secured, the sort of jurisdiction pertinent to a collateral attack depends on whether the service is constitutionally adequate—that is, whether the plaintiff uses a method reasonably calculated to produce actual notice. *Wuchter v. Puzzuti*, 276 U.S. 13 (1928). (Although Hong Kong is not bound by our notions of due process, recognition of foreign judgments is a matter of comity, and as *Hilton* explains the United States will not enforce a judgment obtained without the bare minimum requirements of notice—although it does not insist on the additional niceties of domestic jurisprudence.)

Process was mailed to Ma at his Hong Kong residence. This is reasonably calculated to produce notice, especially when (as here) the party has not told anyone he has moved permanently (and, if so, to where). *Virginia Lime Co. v. Craigsville Distributing Co.*, 670 F.2d 1366 (4th Cir. 1982) (mail to last known address is constitutionally sufficient). Ma did not receive the notice, because he treated his journey to Canada as more than a vacation, but he had actual knowledge of the proceeding. His daughter, who still lived at his house, called him in Switzerland (where he now resides) and told him about the case; Ma authorized his daughter to engage a firm of solicitors to represent him, and she did. Ma signed a retainer agreement with this firm on May 29, 1985, a little more than two months after the commencement of the bankruptcy case. Ma's affidavit recites these facts; Ma says that in 1985 he was "not aware of the seriousness of the bankruptcy proceedings", but this is a far cry from saying that

he was not aware of the proceedings. Hong Kong had an unimpeachable claim to adjudicate Ma a bankrupt and administer his estate: Ma resided in Hong Kong and left substantial assets behind when he fled using travel documents issued by the Crown Colony; the judgment against him was entered by a Hong Kong court that unquestionably had personal and subject-matter jurisdiction. A district judge acting on a petition under §304 would not try to determine technical questions of service, given Ma's knowledge and the conceded substantive power of the foreign court to adjudicate the claims.

So if the receiver had filed a proceeding under §304 in 1985, he would have been entitled to the money. Indeed he might well have had it by default, for Ma does not allege in the complaint that either the receiver or the Bank knew his whereabouts in June and July of 1985. He had not changed the Hong Kong address on file with the Bank. When asked at oral argument, counsel for Ma replied that he did not know whether any communication from receiver or Bank could have reached Ma—unless perhaps they had mailed something to his home address in Hong Kong! Notice by publication in Chicago would hardly have helped Ma, and we do not believe that an ancillary proceeding under §304 may be forever stalled by inability to track down the debtor, for the regular use of that section concerns debtors living outside the United States.

Banks rationally may insist that persons claiming to be foreign receivers file actions under §304. If the receiver had been an impostor, or if the funds had been diverted somewhere between Continental and the receiver, then the absence of an order under §304(b)(2) would have left the Bank on the hook. See *Restatement* §321. But the receiver turned out to be genuine, and the estate received the money. So far as Ma is concerned, the only difference between the informal procedure the Bank used and a formal proceeding under §304 was the lack of an opportunity to wage a collateral attack on the receiver's appointment. As such an opportunity would have been worthless to Ma

and would only have raised the costs of administering the estate, the procedures the Bank followed did not cause Ma any loss.

AFFIRMED

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part:

The majority has taken its "horse" over the jumps here with the abandon of a true steeplechaser. Somehow it has managed to slip by what seems to me the real stone wall on the course. The Bank is, of course, located in Illinois, and the deposit contract was made explicitly subject to Illinois and federal law. There is absolutely no legal basis for the Bank to release funds at the request of a foreign receiver unless and until a petition has been filed under 11 U.S.C. section 304 to authorize ancillary proceedings in Illinois. At that point, a judge in Illinois may direct the surrender of the funds. That this might have cost the estate something is certainly not a good reason for waiving the requirement. To allow banks willy-nilly to ship their depositors' funds on demand to foreign receivers in the hope that the requests will subsequently prove legitimate seems to me very bad policy indeed.

The majority attempts to gallop around the fundamental barrier here by confidently asserting that, had the receiver made an application to the district court pursuant to section 304, the Hong Kong receiver's credentials would certainly have been accepted despite the service defect. Alternatively, as the majority notes, Ma may lack standing to sue because of the settlement with the judgment creditors. There may be substantial merit to these points, but they do not seem to me to legimate retroactively the unauthorized release of the funds by the Bank.

I therefore respectfully dissent to the extent indicated.

A true Copy:

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UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Name of Assigned
Judge or Magistrate WILLIAM T. HART

Case Number 88 C 7827

Date August 3, 1989

Case Title MICHAEL MA v. CONTINENTAL Ill. NAT'L BK. & TRUST CO., etc.

(1) X Judgment is entered as follows:

Pursuant to Memorandum Opinion and Order, IT IS ORDERED that:
(1) Defendant's motion for summary judgment is granted.
(2) Plaintiff's motion for summary judgment is denied.
(3) The Clerk of the Court is directed to dismiss the case with prejudice and enter judgment in favor of defendant.

DOCKETED AUG 07 1989

X (For further detail see XX order attached to the original minute order form.)

XX Notices mailed by judge's staff.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL MA,

Plaintiff,

v.

No. 88 C 7827

CONTINENTAL ILLINOIS
NATIONAL BANK & TRUST
COMPANY OF CHICAGO,
a national banking corporation,

Defendant.

MEMORANDUM OPINION AND ORDER[1]

Before the court are cross-motions for summary judgment. For the reasons indicated below, defendant's motion is granted and plaintiff's motion is denied.

December, 1984, plaintiff Michael Ma ("Ma") opened a money-market account with defendant Continental Illinois National Bank & Trust Company ("Continental"). In July, 1985, Continental, without authority from Ma, transferred the money in the account to an official bankruptcy trustee in Hong Kong. The request for the transfer was made by Continental Illinois Bank Limited ("Limited"), a wholly owned subsidiary of Continental located in Hong Kong. In April, 1985, an *ex parte* bankruptcy order was entered against Ma in a Hong Kong court. Two years later, the Hong Kong court dismissed the action for want of personal jurisdication over Ma. Ma subsequently settled the creditor's judgment, whereupon the trustee released the remaining funds to him.

In September, 1988, Ma filed a four-count complaint against Continental for reimbursement of the monies Continental transferred to the trustee. On Ma's motion, the court dismissed

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[1] This court's January 9, 1989 order is corrected *nunc pro tunc* to state that defendant's motion to dismiss Court III is granted and Court III is dismissed without prejudice.

Counts Two and Four and granted defendant's motion to dismiss Count Three. Plaintiff's Count One, alleging breach of contract, is all that remains of this case. Jurisdiction is based on diversity and Illinois law applies.[2]

"[W]hen money is deposited in a bank, a debtor-creditor relationship exists between the bank and the depositor, and the rules governing their relationship are determined by the contract which exists between them." *Susen v. Citizens Bank & Trust Co.*, 111 Ill. App. 3d 786, 444 N.E.2d 701, 704 (1st Dist. 1982) (quoting from *Menicocci v. Archer National Bank of Chicago*, 67 Ill. App. 3d 388, 391, 385 N.E.2d 63 (1st Dist. 1978)). Assuming Continental breached its contract with Ma, he must still plead the necessary elements for a valid breach of contract action. *Allstate Insurance Co. v. Winnebago County Fair Association, Inc.*, 131 Ill. App. 3d 225, 475 N.E.2d 230, 236 (2d Dist. 1985). Because Ma cannot prove any damages, an essential element of a breach of contract claim, his complaint must fail.

In Illinois, a damage award for breach of contract should place the aggrieved party in the place he would have held had the breach not occurred. *Chicago Painters And Decorators Pension, Health And Welfare, And Deferred Savings Plan Trust Funds v. Karr Brothers, Inc.*, 755 F.2d 1285, 1290 (7th Cir. 1985). Anything more would be a windfall, not recoverable under Illinois law. *Kohlmeier v. Shelter Insurance co.*, 170 Ill. App. 3d 643, 525 N.E.2d 94, 102 (5th Dist. 1988); *First National Bank of Elgin v. Dusold*, 536 N.E.2d 100, 103 (2d Dist. 1989); *Feldstein v. Guinan*, 148 Ill. App. 3d 610, 499 N.E.2d 535, 537 (1st Dist. 1986). These principles prove dispositive of Ma's claim: after the bankruptcy proceeding ended, Ma received his money from the Hong Kong trustee – including the money from his account with Continental. Therefore, any award against Continental would amount to a windfall, placing Ma in a better position than if the alleged breach had never occurred. Ma does not allege any injury arising out of the lost opportunity costs (i.e. money he would have made had he been allowed access to the funds in the account). In any event, such damages cannot be reasonably calculated, and

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[2] Because the parties have treated Illinois law as the governing law in this case, no examination of choice-of-law principles is necessary. *Eggert v. Weisz*, 839 F.2d 1261, 1263 n.1 (7th Cir. 1988)

therefore are not recoverable. *First National,* 536 N.E.2d at 103; *Briarcliffe West Townhouse Onwers Assoc. v. Wiseman Construction Co.,* 107 Ill. App. 3d 402, 480 N.E.2d 833, 839 (2d Dist. 1985). *See also Cincinnati Fluid Power, Inc. v. Rexnord, Inc.,* 797 F.2d 1386, 1393 (6th Cir. 1986). Nor does he ask for lost interest payments. In short, all Ma wants is what he got. He has no claim for more.

IT IS THEREFORE ORDERED that:

(1) Defendant's motion for summary judgment is granted.

(2) Plaintiff's motion for summary judgment is denied.

(3) The Clerk of the Court is directed to dismiss the case with prejudice and enter judgment in favor of defendant.

ENTER:

/s/ WILLIAM T. HART

UNITED STATES DISTRICT JUDGE

Dated: AUGUST 3, 1989

**UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

Case Number 88 C 7827
Date August 16, 1989

Name of Assigned
Judge or Magistrate WILLIAM T. HART

Case Title Michael Ma v. Continental Illinois National Bank & Trust

MOTION: Plaintiff
Motion for Reconsideration

(1) X (Other docket entry;)

Plaintiff's motion for reconsideration is denied. The affidavit and facts referred to by plaintiff were previously taken into consideration.

X Docketing to mail notices.

AUG 18 1989

Docket #
50

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: June 21, 1990

BEFORE: **Honorable** Richard D. Cudahy, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Joseph T. Sneed, Senior Circuit Judge*

No. 89-2844

MICHAEL MA,
Plaintiff-Appellant

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking corporation,
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 88 C 7827, Judge William T. Hart

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED with costs, in accordance with the opinion of this Court filed this date.

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* Hon. Joseph T. Sneed, Senior Circuit Judge of the Ninth Circuit, is sitting by designation.